The present language of the New York standard policy, "while located and contained as described herein and not elsewhere," is intended to obviate the effect of these decisions, and the ruling in the principal case gives effect to that intention. The reasoning, however, upon which the former construction was based, applies with but little less force to the new form, and we shall not be surprised to find many courts adhering to the former construction.

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TRUSTS AND TRUSTEES — WRONGFUL CONVEYANCE — REMAINDERMAN — LACHES.—Land was conveyed to a trustee to be held "for the benefit of A during her natural life and at her death to the issue of A by her husband B," with power of sale and reinvestment on similar trusts, at the request of A in writing. Subsequently the trustee and the life-tenant united in a conveyance of a portion of the property to C, through whom, by several mesne conveyances, one of the defendants claimed title. The deed in question recited a consideration of $3,000 "to the said A (life-tenant) in hand paid." Subsequently the trustee wrongfully quit-claimed to the life-tenant and her husband the remaining portion, and contemporaneously therewith, she and her husband, in consideration of $3,500 'paid to the husband of A' (naming him) conveyed the same to another of the defendants. Some forty years after these transactions, the life-tenant died, whereupon the remaindermen instituted suit to recover the property—alleging that the trustee and life-tenant had committed a *devastavit* of the estate; that the conveyances aforesaid were not made for the purpose of reinvestment, and that the purchase money had been paid not to the trustee but to the life-tenant and her husband, and that the defendants and their predecessors in title were charged with notice thereof by the recitals in the deeds themselves. Defendants amongst other defenses set up the laches of the remaindermen. *Held*, that while ordinarily there can be no adverse possession against remaindermen, or laches in respect to their interest, until the falling in of the particular estate, yet in this case, the conveyances by the trustee, howsoever wrongful, carried full legal title to his grantees, thereby divesting the remaindermen of their title and creating an adverse possession against them in such grantees. *Robinson* v. *Pierce* (Ala.), 24 South, 984.

The decision seems right on principle. The opinion by Head, J., contains a masterly discussion of the questions (1) whether full legal title was in the trustee; (2) whether his wrongful conveyances, showing the breach of trust on their face, carried full legal title to the grantees; and (3) assuming that legal title passed, whether possession was adverse to the remaindermen, during the life of the particular tenant. Each is answered in the affirmative.

See in this connection *Taylor* v. *King*, 6 Munf. 358; *Harris* v. *Harris*, Id. 367; *Gibson* v. *Jones*, 5 Leigh. 370.

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RES JUDICATA—SET-OFF, LARGER THAN PLAINTIFF'S CLAIM—RECOVERY OF SURPLUS.—Plaintiff sued defendant for money collected as attorney. Defendant pleaded a set-off larger in amount than the plaintiff's claim, but under the existing rules of practice, no recovery could be had over against the plaintiff for the surplus; and, under the instructions of the court, the jury allowed so much of the defendant's set-off as was necessary to extinguish the plaintiff's demand. In a subsequent suit by the same plaintiff against the same defendant on

a different contract, the defendant offered such surplus as a set-off. *Held*, that the right to such surplus was not *res judicata*. *Gordon* v. *Van Cott*, 56 N. Y. Supp. 554.

The court distinguishes *O'Connor* v. *Varney*, 10 Gray, 231, and the authorities cited in 21 Am. & Eng. Ency. Law, 224, for the proposition that "a set-off cannot be split up so as to have a portion of it adjudicated in the first suit and a subsequent action brought for the remainder" by the circumstance that in those cases the defendant might have recovered the surplus, if any, over against the plaintiff in the original proceeding; and hence the question whether there was any such surplus, was in issue in the first suit. In the principal case, since no recovery of the surplus could have been had, its existence could not have been in issue. *Hennell* v. *Fairlamb*, 3 Esp. 104; 1 Chit. Pl. 603.

In Virginia, it is clear that a set-off cannot be used 'as a shield, and afterwards as a sword,' since our statute provides for a recovery of the surplus over against the plaintiff, unless he is an assignee, and the set-off is against the assignor, in which case defendant may waive the excess and use his set-off to repel the claim only; or he may have the original creditor brought into the suit, and use a portion of his set-off to repel the assignee's claim, and recover judgment against the original creditor for the surplus. Va. Code, sec. 3304. See *Huff* v. *Broyles*, 26 Gratt. 283.

It is not clear whether by waiving the excess, in the suit by the assignee, the statute intends the waiver to apply only to that proceeding, and to permit a subsequent action to recover the surplus from the person under whom the plaintiff claims, and against whom the counter-claim exists, or whether such waiver is for all purposes. It would seem, however, that the waiver is final, and that the counter-claim is thereby exhausted, and becomes *res judicata*.

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PRINCIPAL AND AGENT—NATIONAL BANKS—PERSONAL LIABILITY OF AGENT, ON UNAUTHORIZED CONTRACT.—Directors of a national bank, before the comptroller of currency had authorized it to do business, leased the property of the plaintiff for a term of years, executing the lease in the name of the bank. After having received proper authority to begin business the bank occupied the premises for a few months and then repudiated the lease and vacated the premises. *Held*, that under U. S. Rev. Stat., sec. 5136, prohibiting the transaction of any business "except such as is incidental and necessarily preliminary to its organization," until authorized by the comptroller to commence business, the bank was not bound by the lease; nor was the same made good by estoppel, save as to liability for the value of what the corporation actually received and enjoyed. *McCormick* v. *Market National Bank*, 165 U. S. 537.

Subsequently the lessor sued the officers, directors and shareholders of the bank for the purpose of holding them personally responsible as partners. The proof was that the lessor was not cognizant of the want of authority.

*Held*, that the defendants are not liable as partners; but the officers who executed the lease, and the directors who authorized it, are personally liable; not on the contract of lease, but in *assumpsit* on an implied warranty that they possessed the requisite authority.

This ruling is in accord with well settled principles. Mechem on Agency, 545, 549, 1 Minor's Inst. (4th ed.) 238; 1 Am. & Eng. Enc. Law (2d ed.) 1127; Story, Agency, 264; *Kroeger* v. *Pitcairn*, 101 Penn. St. 311 (47 Am. Rep. 718);